91-1999

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1991

CHARLES HARWELL,
PETITIONER

VS.

UNITED STATES OF AMERICA,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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COUNSEL OF RECORD

May 18, 1992

QUESTIONS PRESENTED

1. Did the Court of Appeals misconstrue 18 U.S.C. § 1001 by holding that a duty to disclose material information is not necessary to prosecution under the Section?

2. Did the Court of Appeals err in holding that information which Appellant allegedly concealed from HUD was material as a matter of law?

3. Did the Court of Appeals err in holding the evidence sufficient to convict Appellant of conspiracy?

LIST OF PARTIES

Charles Harwell, Appellant below and Petitioner, herein.

The United States of America, Appellee below and Respondent herein.

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No. _____

In The
Supreme Court of the United States
October Term , 1991

CHARLES HARWELL,
PETITIONER

VS.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Charles Harwell, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on December 9, 1991.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is unpublished. A copy of that opinion appears in the Appendix. A motion for rehearing was timely filed on January 22, 1992, and overruled on February 18, 1992. A copy of that order also appears in the Appendix; however no written opinion was issued on rehearing.

JURISDICTION

The Court of Appeals for the Fifth Circuit entered an opinion affirming Petitioner's conviction on December 9, 1991. Petitioner received an extension of time to file his petition for panel rehearing and thereafter timely filed his petition on January 22, 1992. The Court of Appeals overruled the petition for panel rehearing by written order dated February 18, 1992. Therefore, the petition for writ of certiorari is timely filed on or before May 18, 1992.

Petitioner was convicted in the United States District Court, Northern District of Texas, for violations of 18 U.S.C. § 371; 18 U.S.C. § 1010 and 18 U.S.C. § 1001. The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(a) and SUP.CT.R. 13.1

STATUTES INVOLVED

18 U.S.C § 371 provides as follows:

> If two or more persons conspire to either to commit any offense against the United States, or to defraud the United States or any agency thereof any manner or for any purpose, and one or more such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 orimprisoned not more that five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the minimum punishment for such misdemeanor.

18 U.S.C § 1010 provides as follows:

> Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Department of Housing and Urban Development for insurance, or for the purpose of obtaining any extension or renewal or any loan, advance of credit, or mortgage insured by such department, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such department, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, document, or utters, publishes, or passes as true any instrument, paper, or

> document knowing it to have been altered, forged, counterfeited, or willfully overvalues any security, asset, or income, shall be fined not more than $5,000.00 or imprisoned not more than 2 years or both.

18 U.S.C § 1001 provides as follows:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any direct, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

In Cause No. CR3-89-345-T, Appellant was charged by superseding indictment with conspiracy to defraud a governmental agency in violation of 18 U.S.C. 371 (Count 1): Making false statements to the United States Department of Housing and Urban Development, in violation of 18 U.S.C., Sec. 1010 and 2 (Counts 2-11); and concealing material facts from a governmental agency, the United States Department of Housing and Urban Development, in violation of 18 U.S.C 1001 and 2. (Counts 12-17). (R.Vol.I 1-13). Appellant pleaded not guilty in a jury trial was conducted.

Appellant was acquitted on Count 9 of indictment; he was convicted on other Counts. (R.Vol.I 203). Appellant was sentenced to a total term of imprisonment of ten years. (R.Vol.I 204).

At trial, the government presented evidence of an on-going practice involving Appellant, who was a realtor and home builder. Appellant sold houses eligible for HUD insured mortgages in packages to investors who had good credit ratings. These buyers were to function as investors; that is, they would buy up to six houses and would be reimbursed for the downpayment and, in most cases, would not have to pay earnest money. The sales prices for the homes were not negotiable. The buyers would also receive a profit for their participation. The objective was to provide assumable mortgages for other buyers to assume, these buyers apparently not being able to qualify for a loan in the first instance. Many of the ultimate buyers apparently defaulted on their mortgages, which eventually led to the instant prosecution.

Appellant testified that in the Fall of 1985, he had approximately twenty homes unsold in which he had been the builder. At that time, he was having trouble finding persons who could qualify for loans. There were essentially two methods for responding to the needs of consumers who could afford monthly payments, but could not necessarily afford a downpayment. The

first alternative was to use creative financing or adjustable rate mortgages. This was unsatisfactory in two respects: Appellant as seller would have to put up money to "buy down" the interest rate at the inception of the loan and the buyer had to contend with a mortgage rate which might escalate beyond his ability to pay in the near future. Many buyers would be lost after three years. The second alternative was the use of assumable mortgages. Under an assumable mortgage, the buyer would not be subject to the same stringent credit requirements as if he had applied directly to the mortgage company. In response to this need, Appellant began offering these houses in packages to investors. He did not require earnest money from the investors. He had no intent to deceive or defraud any governmental agency in this plan. He had not instructed his employees to mislead anyone concerning the nature of these transactions.

REASONS FOR GRANTING THE PETITION

I.

THE FIFTH CIRCUIT COURT OF APPEALS HAS MISCONSTRUED 18 U.S.C. 1001 BY ITS APPARENT HOLDING THAT A PERSON MAY BE PROSECUTED FOR FAILURE TO DISCLOSE MATERIAL INFORMATION UNDER THIS STATUTE WITHOUT A PRIOR LEGAL DUTY TO DISCLOSE.

The government prosecuted Appellant under 18 U.S.C. § 1001 on the theory that he recruited straw buyers to purchase HUD insured properties and failed to disclose to HUD that the properties would be relinquished to Appellant upon closing, with the aim of placing the homes with buyers who could not qualify for loans in the first instance. Appellant had argued that the government had failed to prove that he had a legal duty to disclose such information, a necessary element for conviction under the statute. *See United States v. Anzalone*, 766 F.2d 676, 683 (1st Cir. 1985); *United States v. Hernando Ospina*, 798 F.2d 1570, 1578 (11th Cir. 1986), and *United States v. Phillips*, 600 F.2d 535, 536 (5th Cir. 1979).

The government responded that it had shown a duty to disclose through the testimony of two HUD underwriters. These underwriters testified in essence that they would not approve any application which did not disclose all of the true facts of a transaction. The government thus took the untenable legal position that everything in an application for financing was material and that all parties had a legal duty to disclose every fact which might later be considered material.

Rather than resolve this question, the Fifth Circuit held that a showing of a duty to disclose was unnecessary, because such a duty allegedly arises when a person omits information sought in a

document, citing *United States v. Waechter*, 771 F.2d 974 (6th Cir. 1985) and *United States v. Maddox*, 689 F.2d 531 (5th Cir. 1982). Slip op. at 3-4. A duty to disclose arises only from a statute, rule or regulation - it does not arise automatically simply by certifying the truthfulness of a document. *United States v. Waechter*, cited by the Fifth Circuit, illustrates this principle. Waechter clearly holds that no duty to disclose concealed information arises in the absence of a HUD rule or regulation. A person does not commit an offense by discovering a loophole in the HUD rules and not disclosing this loophole to HUD in the absence of a statutory duty to disclose. *Waechter*, 771 F.2d 974 at 980.

The chief reason this case merits review by this Honorable Court is that the Fifth Circuit has eliminated an important element of the Government's burden of proof under 18 U.S.C. § 1001. Either the Fifth Circuit has held that certifying to the truthfulness of a government document eliminates the need for a duty to disclose or the Fifth Circuit has adopted the Government's position that every facet of a transaction is material and subject to a duty to disclose. Neither proposition is the law nor should it be.

In a broader sense, issues of due process and fundamental fairness are implicated in the Fifth Circuit's interpretation of 18 U.S.C. § 1001. Of necessity, statutes such as § 1001 must be

broadly construed. Some limits must be maintained, however, to prevent the government from criminalizing conduct which was not criminal at the time it was performed. The evidence in this case established that no HUD rule or regulation prohibited the type of transaction performed by Appellant. The broad nature of § 1001 should not be used in the manner employed by the Government to seek to criminalize the conduct under disclosure requirements. As in Waechter, Appellant may have operated in an area unregulated by HUD. Appellant's conduct, however, did not automatically give rise to any legal duty to disclose. Appellant respectfully prays that this Honorable Court will grant certiorari to review the holding of the Court of Appeals on this issue.

II.
THE COURT OF APPEALS ERRED IN HOLDING THAT INFORMATION APPELLANT ALLEGEDLY CONCEALED FROM HUD WAS MATERIAL AS A MATTER OF LAW.

Appellant was also prosecuted in violation of 18 U.S.C. § 1010: The indictment charged that Appellant falsely stated in sales contract that the alleged straw buyers had provided $2,000.00 of earnest money. Appellant argued that such information was not material as a matter of law. The Court of Appeals responded that two HUD underwriters testified that they would not have approved

the loans had they known that no earnest money was provided -- this established the materiality of the false statements. Slip op. at 6.

The essence of a false statement under 18 U.S.C. § 1010 is that the statement is made for the purpose of obtaining a loan from the lending institution and influencing the Department of Housing and Urban Development. *United States v. Leach*, 427 F.2d 1107, 1111 (1st Cir. 1970). This section prohibits the making of false statements in order to gain an advantage over HUD. *United States v. Waechter*, 771 F.2d at 977.

The evidence at trial established that earnest money was of primary benefit to the seller to commit a buyer on a particular transaction. It was noted that earnest money was part of the buyer's assets and it was never seriously contended at trial that the investors were not credit worthy. Appellant simply waived the requirement of earnest money given the credit worthiness and financial strength of the investors. Given that earnest money is more for the benefit of the seller than the lender, it is doubtful that the Government proved that Appellant made these representations, knowing them to be false, with the purpose of influencing HUD in any manner.

The Court of Appeals correctly noted that the HUD underwriters testified that they would not have approved the loans

had they known that no earnest money had been tendered. Nonetheless, this is only a part of the underwriters testimony. The underwriters took the position that very nearly all of the facts of a particular transaction were material to the decision whether or not to underwrite a loan. The Government's position is simply untenable: not all representations or failure to disclose certain information is material in the sense that it effects the exercise of a Governmental function. Otherwise, persons could be prosecuted for virtually any unknowing misrepresentation in a loan application. The Fifth Circuit's position on materiality is overbroad and should be reviewed by this Honorable Court.

III.
THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE EVIDENCE WAS SUFFICIENT TO CONVICT APPELLANT OF CONSPIRACY.

The first Count of the indictment charged that Appellant conspired with others to defraud the United States of America and specifically the operations and purposes of HUD.

The government called several witnesses who had functioned as nominee buyers for Appellant in the real estate transactions. None of these buyers felt that he or she had done anything wrong; it is quite obvious from the testimony that none of them shared any criminal intent with Appellant, if there was any

criminal intent at all. The only remaining person eligible to be co-conspirator was an attorney who administered the title company responsible for the closings in these cases.

Appellant contended that the evidence was insufficient to support his conspiracy conviction because the only possible co-conspirator had testified to a lack of criminal intent. While the coconspirator's criminal intent need not be as extensive as the Defendant's, the co- conspirator must at least share some parts of the ultimate criminal objective. Simply put, it takes two to conspire. *United States v. Bordelon*, 871 F.2d 491, 494 (5th Cir.), *cert. denied*, 110 S.Ct 121 (1989); *United States v. Onick*, 889 F.2d 1425, 1432 (5th Cir.); *Sears v. United States*, 343 F.2d 139, 142 (5th Cir. 1965). The Fifth Circuit held that the attorney was indeed a co-conspirator because he had expressed concern about the transactions to Appellant and had prepared letters falsely verifying the existence of earnest money; from this, according to the panel, the jury could have inferred that the attorney knew his acts were unauthorized. Slip op. at 7.

This resume of the attorney's testimony is not complete. The attorney also testified that he had not determined that there was anything illegal about the transactions and would have discontinued the closings if he had felt they were illegal. Moreover, he had researched the matter himself and discussed it

with an attorney friend. The testimony cited by the Fifth Circuit indicated that the attorney may well have been guilty of misprision of a felony; however, the attorney nowhere testified to possession of any criminal intent. In the absence of any co-conspirators sharing a criminal intent, Appellant's conviction for conspiracy simply cannot stand. Appellant also respectfully request that this Court review this holding of the Court of Appeals.

CONCLUSION

It is respectfully submitted that for the reasons outlined above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Original signed by:
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COUNSEL OF RECORD

May 18, 1992

UNITED STATES of America,
Plaintiff-Appellee,

v.

Charles HARWELL,
Defendant-Appellant.

United States Court of Appeals
Fifth Circuit

December 9, 1991

JONES, Circuit Judge:

Appellant Charles Harwell, a realtor and builder recruited investors to act as straw buyers to purchase his homes at fixed prices. The investors would obtain HUD-insured mortgages and then reconvey the homes back to Harwell. Id. Harwell then sold the homes to the actual buyers at prices fixed by Harwell that were uniformly lower that the original prices. Having been indicted for 26 counts of conspiracy to defraud the U.S. government, making false statements to HUD, and concealing matters within the jurisdiction of the U.S. government, he was convicted of all but one of them and sentenced to ten years imprisonment. Harwell filed a timely notice of appeal.

On appeal Harwell argues in general terms that there was insufficient evidence to support his conviction on all counts. Because he does not argue how the evidence is insufficient with regard to individual counts, his claim has been analyzed in the same general terms rather than to analyze the evidence supporting each count.

An insufficiency-of-evidence claim must fail if "a

reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), aff'd 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983). The evidence is viewed in the light most favorable to the Government, and inferences and credibility choices are resolved in favor of the verdict. United States v. Santisteban, 833 F.2d 513, 516 (5th Cir. 1987).

Counts 12-26 of the indictment alleged that Harwell concealed the following information from the Department of Housing and Urban Development (HUD): (1) that the purchase prices of the properties were inflated; (2) that the buyers would immediately relinquish ownership in the properties; and (3) that the buyers would not be making downpayments from their own funds. Harwell argues that there is insufficient evidence to establish that he concealed these facts from HUD. He contends that he did not violate 18 U.S.C. Sec. 1001 because he had no duty to disclose the allegedly false facts, there was no evidence that he knowingly concealed any information, and there was a fatal variance between the allegations in the indictment and the evidence introduced at trial.

To establish an offense under 18 U.S.C. Sec. 1001 the Government must prove that the defendant knowingly and willfully concealed and covered up by trick, scheme, or device a material fact within the jurisdiction of the United States. United States v. Swaim, 757 F.2d 1530, 1533 (5th Cir.), cert. denied, 474 U.S. 825 (1985). Mere omission or failure to disclose is insufficient to establish the offense. United States v. Ford, 797 F.2d 1329, 1334 (5th Cir. 1986), cert. denied, 479 U.S. 1070 (1987). The Government must prove that a "material fact was affirmatively concealed by ruse or artifice, by scheme or device." United States v. London, 550 F.2d 206, 214 (5th Cir. 1977).

Harwell's contention that he had no duty to disclose the information alleged in the indictment is meritless. An individual makes an express factual assertion when he omits information expressly sought in a document and signs the document certifying the completeness and truthfulness of the information provided. United States v. Waechter, 771 F.2d 974, 978 (6th Cir. 1985) (citing United States v. Mattox, 689 F.2d 531, 532 (5th Cir. 1982)). A failure to respond where there is a duty to disclose is a false representation. Mattox, 689 F.2d at 532-33.

The loan applications and sales contracts submitted by the straw buyers had to be signed and had to certify that the information provided was complete and accurate. The information provided on the loan application states that the buyer is providing the downpayment, and the sales contract expressly states that it is the only agreement between buyer and seller. The straw buyers had a duty to respond truthfully in the loan application, and therefore Harwell's argument that there was no duty to disclose is meritless. See Mattox, 689 F.2d at 532-33.

Harwell's argument that there was no evidence that he knowingly concealed the information is also meritless. The evidence at trial established that, when Harwell's con-conspirator, Glenn Snyder, expressed concern the false applications were being submitted to HUD, Harwell responded: "They're just a bunch of bureaucrats. All they want is something in the file to cover themselves." Harwell asked Snyder to delay sending the paperwork for the second sale to the lender so that it would not appear that the purchases were made simultaneously. Harwell attempted to "launder" the reimbursement checks for some of the downpayments by having one of his real estate agents write a check to the straw buyer and by purchasing a cashier's check in the name of a straw buyer using his own funds. Harwell asked Diane

Halsey, a loan officer with one of the mortgage companies, to lie and state that the straw buyers provided the downpayments. From this evidence the jury was entitled to infer that Harwell knowingly and willfully concealed the information from HUD. See United States v. Hopkins, 916 F.2d 207, 214-215 (5th Cir. 1990).

Finally, Harwell's contention that there was a fatal variance between the allegations in the indictment and the evidence at trial must also fail. The argument, although identified as a "fatal variance" issue, is no more than an argument that the Government's proof of the allegations of counts 12 through 26 was insufficient. he argues that there was insufficient proof that the prices of the houses were inflated and that the buyers did not make the downpayments with their own funds.

The evidence established that the straw buyers were either reimbursed at closing for the downpayments, or did not even provide a downpayments. This evidence supports the indictments' allegation that the buyers did not provide the downpayment. The evidence also established that the homes were immediately resold at lower prices. From this evidence the jury could infer that the original prices were inflated. Harwell's argument that there was no expert testimony to prove the inflated prices is irrelevant because there is no authority for the implied proposition that such proof can be established only through experts. Viewing the evidence in the light most favorable to the Government, the evidence was sufficient to establish that Harwell knowingly and willfully concealed material facts from HUD, and his conviction on counts 12-26 must be affirmed.

Counts 2-11 of the indictment alleged that Harwell had his real estate agents falsely state in the sales contract that the straw buyers provided $2,000.00 in earnest money, in violation of 18 U.S.C. Sec. 1010. Harwell argues that the Government failed to

establish that these statements were made with the intent to influence HUD or that the statements were material.

A person violates Sec. 1010 if, for the purposes of obtaining a HUD-insured loan, he "makes, passes, utters, or publishes any statement, knowing the same to be false." 18 U.S.C. Sec. 1010; United States v. Arky, 938 F.2d 579, 581 (5th Cir. 1991). Section 1010 prohibits the making of false statements in order to gain an advantage over HUD. Waechter, 771 F.2d at 977.

Harwell does not deny that he instructed his real estate agents to include in the sales contract a recitation that the straw buyers provided $2,000 in earnest money. Several straw buyers testified that they did not provide the earnest money. Therefore, the falsity element was established.

Materiality is a question of law determined by the court and subject to de novo review. United States v. Luebens, 838 F.2d 751, 753 (5th Cir. 1988). A fact is material if it has the "natural tendency to influence, or be capable of affecting or influencing a government function." Swaim, 757 F.2d at 1534 (quoting United States v. Markham, 537 F.2d 187, 196 (5th Cir. 1976), cert. denied, 429 U.S. 1041 (1977)). The Government need not prove that the allegedly false statement actually influenced HUD. Id. Two HUD underwriters testified at trial they would not have approved the loans if they had known that no earnest money was provided. This evidence clearly establishes that the false statements were material, and Harwell's conviction for counts 2-8 and 10-11 accordingly must be affirmed.

Finally, count 1 of the indictment charged Harwell with conspiracy to defraud the United States. Harwell argues that there was insufficient evidence to establish this offense because the Government failed to establish that he had the necessary intent to

further an unlawful objective and failed to prove that any other person shared his criminal intent.

To establish a conspiracy under Sec. 371 the Government must establish (1) that two or more people agreed to pursue an unlawful objective; (2) that the defendant voluntarily agreed to join the conspiracy; and (3) that one of the members performed and overt act to further the objectives of the conspiracy. Parekh, 926 F.2d at 406.

Snyder, Harwell's con-conspirator, testified that he and Harwell had an agreement to make false representation about the earnest money. Snyder further testified that he discussed the false representations with Harwell, that he expressed concern to Harwell about these false representations; and that Snyder provided letters falsely verifying that each straw buyer had earnest money on deposit with the title company. From this evidence the jury could infer that Snyder knew that his acts were unauthorized. Bordelon, 871 F.2d at 494. As discussed above, Harwell had the requisite intent to violate Sects. 1001, 1010, and therefore his conviction for count 1 must stand.

For the foregoing reasons, we reject the points urged by Harwell and AFFIRM his conviction.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 91-1199

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHARLES HARWELL,
Defendant-Appellant

Appeal from the United States District Court for the
Northern district of Texas

ON PETITION FOR REHEARING
(February 18, 1992)

Before JONES, DUHE' and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehrraing filed in the above entitled and numbered cause be and the same is hereby Denied.

ENTERED FOR THE COURT:

/s/ Edith H. Jones 2/10/92
United States Circuit Judge